No. 14370

United States Court of Appeals

For the Ninth Circuit

WILLIAM CHERNEKOFF, JR.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellant's Opening Brief

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction of the appellant by the District Court of the Southern District of California.

This court has jurisdiction under the provisions of 28 United States Code, Sections 1291 and 1294 (1).

STATEMENT OF THE CASE

Appellant was indicted under U. S. C., Title 50, App. Sec. 462—Universal Military Training Service Act, for refusing to submit to induction [R. 3].[1]

[1]All references to the Transcript of Record are designated by pages of it, as follows: [R. 3]. A photocopy of the entire Selective Service File of Appellant was entered in evidence as Government's Exhibit 1-A. The file is not part of the Transcript of Record but is before the court. All references to the file are designated as pages of Exhibit 1-A, as follows: [Ex. p. 3]; the pagination of Exhibit 1-A is by a one-quarter inch high pencilled number, circled, and ordinarily is found at the bottom of each sheet of the Exhibit.

Appellant was convicted by Judge Harry C. Westover on December 28, 1953 [R. 6]; he was sentenced by said judge to a 3-year term of imprisonment on December 28, 1953. [R. 6].

In the court below as well as before the Selective Service Agencies, appellant claimed to be a conscientious objector to all participation in military activities and that he was entitled to a classification as such, to-wit: I-O.

In his Classification Questionnaire appellant set forth that he had no military experience [Ex. p. 6]; that he had no court record [Ex. p. 9]; that he was a conscientious objector and desired the Special Form for Conscientious Objector and that he believed he should be classified in Class IV-E [Ex. p. 10]. At that time Class IV-E was the classification for conscientious objectors whose scruples extended to entering the armed services in any capacity. The classification was later termed I-O on 28 September 1951.

In his Special Form for Conscientious Objector [Ex. pp. 12-15] appellant set forth all the details requested concerning his religious training and belief. He showed he believed in a Supreme Being and that this belief involved duties which are superior to those arising from any human relation [Ex. pp. 12-.....]; that he received this training and acquired this belief from his parents and his church; that he belonged to the Molokan Spiritual Jumpers [one of the historic pacifist churches] all of his life. He followed the directions on this Special Form and chose to strike out Series I

(A), the non-combatant claim, and signed Series I (B), the "complete" conscientious objector claim; nevertheless, despite of his claim and his evidence the board classified him in Class I-A-O (the non-combatant classification).

He then asked for a personal appearance before the local board for a review of his claim for a I-O Classification. [Ex. p. 17].

He was given an appointment for December 19, 1951 [Ex. p. 18]. The summary of said hearing [at that time the board was required to make and file a summary] shows he appeared and submitted additional evidence [Ex. p. 19]. Although the submitted affidavit of his church elder [Ex. p. 20] supported his evidence for the I-O classification, and despite of the fact that there was no evidence to the contrary he was not reclassified in Class I-O. In fact, the Minutes of Action [Ex. p. 11] fail to show that the local board ever voted on the point, the minutes merely reciting "Reviewed and Retained", the space for the vote (if any was taken) being left blank.

Thereafter the entire file was sent to the appeal board, and it, on April 30, 1953 [Ex. p. 11] reclassified appellant in Class I-A.

When appellant was ordered to report for induction he did so but announced he would refuse to submit to induction [Ex. pp. 35, 36]. There is no evidence in the Exhibit, or in the Record that appellant was asked to take the "step forward" at the induction

station, or informed of the penalty for refusal, both being required by the regulations.

During the trial appellant testified he was never asked to step forward although the regulations require that a recalcitrant have been asked *twice* to step forward. [R. 4].

After his conviction appellant employed counsel; it was then discovered that appellant had been sent an obsolete notice by the Hearing Officer of the Department of Justice, said notice not informing appellant of his right to ask the Hearing Officer for the general nature and character of adverse evidence, if any. The file discloses that the hearing officer was in the possession of adverse evidence and that it was used against appellant. [Ex. p. 23-24].

The trial court denied appellant's Motion for New Trial [R. 16].

QUESTIONS PRESENTED AND HOW RAISED

I.

The record shows that appellant presented evidence to the selective service system that he was a conscientious objector. There was no evidence placed in the file refuting his evidence.

The question presented is whether there is a legitimate basis in fact for brushing aside his evidence and giving him a I-A classification.

This point and the following point was raised by the defendant (in *pro per)* by the equivalent of a Motion for Judgment of Acquittal.

II.

The record shows that appellant was never asked to step forward at the induction station during the induction ceremony nor informed of the penalty for failure to step forward.

The question presented is whether stepping forward and the warning of the penalty are essential.

III.

The record shows that appellant was sent an obsolete and defective notice by the Hearing Officer of the Department of Justice, a notice that did not inform him of his right to request the general nature and character of the adverse information in the said officer's file.

The question presented is whether this constituted a denial of a fair hearing inasmuch as adverse evidence was in the possession of the hearing officer and was used against appellant without appellant knowng of these facts.

This point and the following point were raised by affidavit and Motion for New Trial on the basis of newly discovered evidence.

IV.

The California local draft boards do not "conspicuously post the names and addresses of Advisors to Registrants, as required by §1604.41 of the regulations, nor, in fact, do they have any such Advisors.

The records in other appeals before this court show this to be an undisputed fact.

The question presented here, aside from the possible one of the court taking judicial knowledge, is whether this fact alone, or in conjunction with Point III above is a denial of due process.

SPECIFICATION OF ERRORS

The District Court erred

1. In not concluding that the classification of appellant was without basis in fact [R. 6].
2. In not concluding that there was a failure of proof in connection with the induction ceremony. [R. 6].
3. In not concluding that a new trial should have been granted appellant [R. 16].

SUMMARY OF ARGUMENT

I.

Dickinson has made it clear that an unrebutted *prima facie* showing for a deferred draft classification invalidates a final I-A classification. *Dickinson v. United States,* 74 S. Ct. 152.

There is nothing in the file to rebut his claim and his *prima facie* evidence for a conscientious objector classification.

II.

The applicable regulations require that a selectee be informed of the induction procedure, specifically that he will be ordered to step forward and that this is the symbolic change from selectee to inductee; the regulations also require that a recalcitrant selectee be informed that his conduct, if repeated, is a felony punishable by 5 years imprisonment and/or $10,000.00 fine.

Neither of these requirements were observed and both are essential to conviction.

III.

Nugent has made it clear that a selective service registrant claiming conscientious objection to participation in military service, is entitled to the opportunity to be forewarned of adverse evidence to his claim so that he may defend himself at the Hearing Officer hearing. *United States v. Nugent,* 73 S. Ct. 991.

This appellant was never given such an opportunity and the record shows there was adverse evidence and that it was used to his detriment.

IV.

The applicable regulations require that every local board have an Advisor to Registrants and that the names and addresses of such advisors be conspicuously posted.

No California local boards have such advisors and no names and addresses are posted. This fact, alone, but especially when coupled with the facts of this case showing (1) that this appellant needed an advisor and (2) that he had no proper notice from the hearing officer amounts to a denial of due process.

ARGUMENT

I.

THE SELECTIVE SERVICE SYSTEM HAD NO BASIS IN FACT FOR THE DENIAL OF THE CLAIM AS A CONSCIENTIOUS OBJECTOR MADE BY APPELLANT, AND IT ARBITRARILY CLASSIFIED HIM IN CLASS I-A.

The evidence submitted by the appellant establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service which were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code," but that it was based upon his religious training and belief as one of the Molokan Spiritual Jumpers.

The local board accepted his testimony and there was no question whatever before them on the veracity of the appellant. They merely misinterpreted the evidence. The question is not one of fact but is one of law. The law and the facts irrefutably establish that appellant is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there was no contradictory evidence in the file before the local board disputing appellant's statements as to his conscientious objections and there was no question of veracity presented,

the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding (that the undisputed evidence did not prove appellant was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

There is absolutely no evidence whatever in the draft board file that appellant was willing to do military service. All of his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. The appeal board, without any justification whatever, held that he was willing to perform military service. Never, at any time, did the appellant suggest or even imply that he was willing to perform any military service. He, at all times, contended that he was unwilling to go into the armed forces and do anything as a part of military machinery.

The law on this subject has been discussed in over a dozen briefs submitted to this court, in cases already orally argued [May 2-4, 1954] but as yet undecided.

It is to be remembered that this court followed *Dickinson v. United States,* 74 S. Ct. 152 in *Schuman v. United States,* 208 F. (2) 801.

Counsel for both parties are familiar with the May 2-4 cases above referred to and doubtless will concede that the disposition of the May 2-4 cases if on the no-

basis-in-fact point will be dispositive of the point in this case.

II.

THE UNDISPUTED EVIDENCE SHOWS THAT THE APPELLANT WAS NOT GIVEN AN OPPORTUNITY TO GO THROUGH THE INDUCTION CEREMONY AND THEREFORE HE IS NOT GUILTY OF REFUSING TO SUBMIT TO INDUCTION.

The Army regulations govern the induction ceremony. Unless and until the selectee has been put through the induction ceremony he cannot be said to be in the army.—*Billings v. Truesdell,* 321 U. S. 542, 559; *Corrigan v. Secretary of the Army,* 9th Cir., March 5, 1954, 211 F. 2d 293. The *Corrigan* decision turned solely on the fact that Corrigan did not "step forward". It is clear, therefore that the "stepping forward" is essential.

The induction ceremony is prescribed by Army regulation SR 615-180-1. This regulation requires the induction officer to line up all the selectees in a line-up. Then each selectee is told to take one step forward as his name is called. He is informed that this stepping forward constitutes his induction into the armed forces. If the selectee refuses to step forward the induction officer is required by the regulation to take the selectee out of the line-up. The officer is then required by the regulation to explain to him his obliga-

tion to submit to induction, and that if he refuses to do so he will be prosecuted in the civil, federal courts on a felony charge. It also provides "He will be informed further that convictions of such offense under civil proceedings will subject him to be punished by imprisonment for not more than five years or a fine of not more than $10,000 or both." The induction officer is then required to again request the selectee to stand at attention and take one step forward when his name is called again. If he again refuses to take the one step forward the induction officer is required to take a statement from him to the effect that he refuses to submit to induction. Then the selectee is released.

The undisputed evidence in this case shows that appellant complied with the order to report for induction so far as required by law. He went to the induction station. The document he signed at the station [Ex. p. 36] indicates that he had obeyed all orders up to the stepping forward. The induction officer did not complete the procedure prescribed by the Army regulations. [Ex. p. 35 and R. 23]. He stopped the process and never did complete it. All that was done is that a statement was taken from appellant that he refused to submit to induction. Appellant was not given an opportunity to refuse to submit to induction. The induction officers did not complete the process. Appellant cannot be found guilty of stopping the induction process. He is not charged with having refused to complete the process. He is charged with having re-

fused to submit to induction. The undisputed evidence shows that he was never subjected to the induction ceremony.

Before the duty of the appellant could be established there was a duty that had to be performed by the induction officers. They were bound to complete the process and put appellant into the line-up or at least to formally request him to submit to induction. He was never given the opportunity to refuse to submit to induction.

Appellant has been convicted of refusing to submit to induction because he signed a statement that he would not be inducted.

The situation here is analogous to the conviction of a man for murder. A defendant can be indicted for murder but he cannot be convicted of the offense merely because he made a statement that he was going to commit the murder. It is necessary for a shot to be fired with malice aforethought and that death result from the shot in order for the *corpus delicti* to be established. The *corpus delicti* in the offense here was never established. The appellant never committed the offense he was charged with in the indictment. He was never brought to the point of being requested to submit to induction. All that happened was that the induction officials did not complete the process. They merely took a statement from him and released him after he stated he refused to be inducted. The mere statement that a selectee refuses to submit to induction is not equivalent to the offense of refusal to submit to induc-

tion. The *corpus delicti* was not established in this case.

Statutes creating and defining crimes cannot be extended by implication or intendment.

U. S. v. Carney, 228 F. 163.

Mere intent to violate law, not followed by actual violation, is not a crime.

Sherman v. U. S., 10 F. 2d 17

A statutory offense cannot be established by implication, and there can be no constructive offense, and before an accused can be punished, his act must be plainly within the statute.

Arnold v. U. S., 115 F. 2d 523.

When a statute defining a crime states that certain things must be done before the crime be deemed complete, that crime is not committed before the designated acts are accomplished.

State v. Ledford, 81 P. 2d 830, 195 Wash. 581.

A defendant cannot be convicted of crime unless the act is within both letter and spirit of penal statute.

Group v. State, 236 P. 2d 997.

The written "confession" of defendant, given the inducting officer, is relevant to show intent but this

alone is not sufficient to convict. The "confession" further, is only to a state of mind existing *before* the time when an actual order to submit was to have been given, if the regulations had been followed.

It is a document he could just as well have written the day before, perhaps even sent it a year before to his draft board.

The failure of the inducting officer to actually *order* the defendant to rise, and then to step forward upon the calling of his name vitiates the "confession". The "confession" therefore is out on a limb; it is no confession but is something for a filing cabinet, not a court of law.

Corpus Juris Secundum vol. 22, p. 95: "The legislature cannot make an unexecuted criminal intent a crime."

Corrigan, supra, shows that the "stepping forward" is essential. In *Corrigan,* the failure to step forward meant Corrigan had not entered the armed services. In this case appellant was not actually ordered to step forward; no crime was committed by him.

Corrigan, a few minutes before the induction ceremony, informed the Army officials he was not a conscientious objector but then changed his mind a few seconds before the moment he was to obey the order to put one of his feet forward; Chernekoff, a few minutes before the induction ceremony, informed the Army officials he would not step forward but was never actually given the order to do so and the oppor-

tunity to change his mind when confronted with the actual necessity of a final decision. Chernekoff was not given the final opportunity to submit contemplated by the regulation. The regulation required

(1) a physical act;
(2) a second chance;
(3) a warning of the penalty.

Additionally, there is a complete absence of any proof that appellant, at the abortive induction ceremony, was advised that it was a felony to refuse to submit to induction and advised of the penalty. At least one court has already found this omission fatal. In *United States v. Eaby, D.* of Utah, Cr. No. 16152, decided May 7, 1952:

> "THE COURT: Ladies and gentlemen of the jury, it will not be necessary for you to go further in this matter; *the Government has failed in its proof.* The regulation issued under the Selective Service Act requires that this man be asked if he will take a step forward and, if he refuses, the regulation requires that he then be told what the penalties are for that refusal and then he must be asked again, having knowledge of the penalties, to take the step forward.
>
> "*There is no evidence in this record whatsoever* that between those two requests the regulation was followed and this man told what the penalties were. The Court grants Defense Counsel's motion for a judgment of acquittal.
>
> "You are now excused from service in this case." [Underscoring supplied.]

It is respectfully submitted that the trial court should have granted the motion for judgment of acquittal.

III.

APPELLANT WAS ENTITLED TO EITHER BE GIVEN A RESUME OF THE ADVERSE EVIDENCE OR TO AN OPPORTUNITY TO REQUEST THE HEARING OFFICER OF THE DEPARTMENT OF JUSTICE TO FURNISH HIM SUCH A RESUME. NEITHER HAVING BEEN GIVEN HIM HE WAS DENIED A FAIR APPEAL.

Appellant was given a "partial" conscientious objector classification by his local board on November 28, 1951, Class I-A-O. [Ex. p. 11]. He made a timely written appeal and on April 30, 1953 the appeal board reclassified him in Class I-A.

Nugent v. United States, 73 S. Ct. 991, decided shortly afterwards, on June 8, 1953, held that the registrant was entitled to ". . . a fair resume of any adverse evidence in the investigator's report." [994]. The court is asked to take judicial knowledge of the fact that the Attorney General, under date of September 3, 1953 informed the Hearing Officers as follows:

> September 3, 1953
>
> MEMORANDUM FOR HEARING OFFICERS
>
> Your attention is invited to the fact that paragraph five of Addendum No. 1 to the Instructions

states that a resume of the information developed by the inquiry is attached.

The resume referred to therein will be prepared by this office and sent to Hearing Officers through United States Attorneys in *only* those cases in which investigations have been completed on or after August 17, 1953. Therefore, in those cases in which you *have not received* resumes of investigative reports, you are requested to send to registrants the old form of "Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed" which provides that registrants upon request may be advised as to the general nature and character of any evidence in the Hearing Officer's possession which is "unfavorable to, and tends to defeat, the claim of the registrant. . . . "

The new "Notice of Hearing and Instructions to Registrants Whose Claims for Exemption as Conscientious Objectors Have Been Appealed" enclosed herewith should be sent only to those registrants for whose cases resumes have been received by Hearing Officers from the department.

Except as provided above, Memorandum No. 41, together with attachments, supersedes all previous instructions issued by the Department with respect to conscientious objector matters.

s/ T. Oscar Smith
T. Oscar Smith
Special Assistant to the
Attorney General

It is therefore clear that appellant was never given a "resume" but should have been given a Notice of Hearing, by his Hearing Officer, that included the information to him that he " . . . upon request may be advised etc."

The undisputable evidence is that the Notice of Hearing sent this appellant was defective and didn't include such information.

The affidavit of appellant [R. 11-16] shows that he received a 3 page Notice of Hearing from the Hearing Officer, said Notice being made part of the affidavit. Said Notice [R. 13-15] reveals a total absence of advice on this point. Such missing advice was invariably worded:

> "Upon request therefor by the registrant at any time after receipt by him of the notice of hearing and before the date set for the hearing, the hearing officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat, the claim of the registrant such request being granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence."

Appellant's affidavit was ordered filed as of record in this case. [R. 16, 41, 42].

To leave no doubt on this matter a letter from the Attorney General is set forth:

DEPARTMENT OF JUSTICE
Washington, D. C.

September 2, 1953

J. B. Tietz, Esquire
534 Douglas Building
South Spring & Third Streets
Los Angeles 12, California

Dear Mr. Tietz:

This acknowledges your letter of August 21, 1953, in which you advise that you have found "various versions" of Instructions to Registrants and in which you request certain information with respect thereto.

To my knowledge there is only version of Instructions to Registrants currently in effect and that is the one which contains advice to registrants that they may upon request be furnished with a summary of any information which might tend to defeat their claims. There was for a short period some instructions which did not contain such advice; nevertheless, registrants were not denied such information either before or at the hearing if they so requested it.

The current Instructions to Registrants will remain in effect to all cases in which investigations were completed prior to August 17, 1953. Registrants in whose cases investigations were completed on or after August 17, 1953, will be furnished with resumes of both favorable and unfavorable information contained in the investigative reports whether or not they request such information.

There is enclosed one copy of each set of Instructions to Registrants which are now in effect, each to the extent described above.

Sincerely,
s/ T. Oscar Smith
T. Oscar Smith
Special Assistant to the
Attorney General

It is therefore crystal clear from the above first, that appellant should have been informed that upon request, a summary of the adverse evidence would be given him by the Hearing Officer; it is also clear from the record [R. p. 12] second, that he was not given such information; third, that he actually didn't know he could ask for it [R. 12]; fourth, that he didn't ask for it [R. 12]; fifth, that there actually was adverse information [R. 12 and Ex. pp. 23-24]; and sixth, that the never-disclosed adverse information [R. 12] was used against him to his detriment [Ex. pp. 23-24].

It is submitted that this is a compounded denial of due process. The *use* of undisclosed adverse testimony by a Hearing Officer resulted in an acquittal in *United States v. Bouziden,* 108 F. Supp. 395, 398. Here, we have a more flagrant case because this appellant never knew he could be informed of the testimony against him.

IV.

THE FAILURE TO HAVE THE NAMES AND ADDRESSES OF ADVISORS TO REGISTRANTS POSTED IN THE LOCAL BOARD OFFICE, RESULTED IN A DENIAL OF DUE PROCESS TO APPELLANT.

Section 1604.41 of the selective service regulations, at all times has been:

> ADVISORS TO REGISTRANTS
>
> 1604.41 APPOINTMENT and DUTIES. — Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the Selective Service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspiculously posted in the local board office.

In the case of *Davidson v. United States,* No. 14356, currently before this court the record discloses that Lt. Col. Francis A. Hartwell testified that he is the assistant deputy Director of Selective Service for the State of California and that there are no Advisors to Registrants "set-up" in California. [42]. In the case of *Mason v. United States,* No. 14286, currently before this court the record discloses that Lt. Col. George R.

Farrell testified that he is Co-Ordinator of District Three, Selective Service System, State of California [51] and none of the boards in his district have ever complied with Section 1604.41 of the regulations [53].

It is therefore clear that no California local boards have such advisors and no names and addresses are posted. This fact, alone, but especially when coupled with the facts of this case showing (1) that this appellant needed an advisor and (2) that he had no proper notice from the hearing officer, amounts to a denial of due process.

Such was the holding of Judge Peirson Hall in *United States v. Kariakin,* No. 23223, S. D. California, January 12, 1954:

> "MR. TIETZ: Your Honor has heard me on all the material points that I wish to present.
>
> THE COURT: Very well.
>
> I am inclined to thing that your point is good in connection with the matter of not being properly advised of his rights. You call it a matter of defective notice.
>
> MR. TIETZ: Yes, sir.
>
> THE COURT: I do not know that it could be so classified as a defective notice because I do not know that they are required by any regulation to give a notice which includes that.
>
> MR. TIETZ: But they do. That is what I was trying to establish.
>
> THE COURT: They do that as a matter of practice and it is not—in other words, I do not think the practice can result in the creation of a

right to a person to commit a crime, but I do think that under the regulations and the Selective Service procedure that these men are entitled to have advisors and persons performing the function of advisors and they are entitled to be able to look to them for advice and to be told by them what their rights were. In this case he was entitled as a matter of right to receive the fair summary of the adverse testimony if he requested it, but he was never advised that he had the right to request it, either by the notice and the fact that they do now contain that notice, which I understand you stipulated to is evidence that the Selective Service System recognizes that they are entitled to have that advice and were entitled to have that advice.

For that reason I think that the defendant here was deprived of his right to that advice and that the regulations were not followed in that respect and he should be and is acquitted, and his bond is exonerated.

MR. TIETZ: Thank you."

It is submitted that appellant Chernekoff was denied due process of law exactly as was his cousin Kariakin, in the above titled prosecution.

CONCLUSION

1. There was no basis in fact for a I-A classification. At the very least, appellant should have retained the I-A-O classification.
2. There was an utter failure of proof that appellant was guilty as charged in that the induction ceremony was abortive.
3. Appellant was never given a fair hearing before the hearing officer because he was never informed of the adverse evidence.
4. Appellant was deprived of the right to an Advisor to Registrants.

Respectfully submitted,

J. B. TIETZ
Attorney for Appellant.